



Kenya Railways Corporation v Combined Warehouse Limited & 5 others (Environment & Land Case 188 of 2017) [2023] KEELC 21924 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 188 OF 2017
NA MATHEKA, J
NOVEMBER 30, 2023**

BETWEEN

KENYA RAILWAYS CORPORATION PLAINTIFF

AND

COMBINED WAREHOUSE LIMITED 1ST DEFENDANT

**THE OFFICIAL RECEIVER AS THE LIQUIDATOR SWAN MILLERS LIMITED
(UNDER LIQUIDATION) 2ND DEFENDANT**

THE DIRECTOR OF SURVEY 3RD DEFENDANT

THE COMMISSIONER OF LANDS 4TH DEFENDANT

THE LANDS REGISTRAR MOMBASA 5TH DEFENDANT

THE COUNTY GOVERNMENT OF MOMBASA 6TH DEFENDANT

RULING

1. The application is dated 13th June 2023 and is brought under Section IA, IB(I), 3A and 63(e) of the [Civil Procedure Act](#), Order I Rules 10 (2) and Order 51 Rule I of the [Civil Procedure Rules](#) seeking the following orders;
 1. This Application be certified urgent and be heard ex parte in the first instance.
 2. The hearing fixed for 14/6/2023 be held in abeyance pending the hearing and determination of this application.
 3. The Ethics and Anti-Corruption Commission be joined as 2nd Plaintiff in this suit and the plaintiffs be granted leave to file a joint Plaint and necessary pretrial documents.
 4. Costs of this application be provided for.



2. It is based on the following grounds that Section 13(c) which mandates the Intended 2nd Plaintiff to conduct investigations on its own initiative or on a complaint made by any person and Section I which mandates the Intended 2nd Plaintiff to institute and conduct proceedings in court for purposes of the recovery or protection of public property, the Intended 2nd Plaintiff commenced investigations on allegations made in a complaint made by the Plaintiff/Applicant on illegal alienation of the parcel or previously un-surveyed land but now illegally surveyed in deed plan no. 130492 and registered as C.R 19951 L.R MN/V/703 in the name of the 1st Respondent. The Intended 2nd Intended Plaintiff investigated the complaint with a view of recovering the suit property in accordance with the law as the property is alleged to be public land that has been alienated from Kenya Railways Corporation, the Plaintiff/Applicant herein fraudulently and through corrupt means. The Intended 2nd Plaintiff is in the process of concluding the investigation into the alleged fraudulent and corrupt alienation of the suit property. The investigations by the Intended 2nd Plaintiff will assist this Court completely and effectually adjudicate upon and settle all questions involved in the Plaintiff/Applicant's suit in the Plaint dated 30/7/2017.
3. The 1st Defendant opposes the application and states that on 13th June 2023, just before the hearing of this substantive suit, the Plaintiff filed the instant application seeking to join the Ethics and Anti-Corruption Commission as a 2nd Plaintiff on the allegations that the EACC is in the process of finalizing an investigation for fraud against the Defendants in respect of the suit property. That the Plaintiff has not produced any evidence before this Court, in the instant Application or in its List of Documents, to substantiate the said allegations or that the EACC has commenced any investigations whatsoever in that regard. That in the same vein, the 1st Defendant has received no communication whatsoever from EACC nor any indication that the EACC is carrying out investigations into the suit property. That since the institution of this suit in February 2017, the Plaintiff has never made any application for joining of any party. It therefore is grossly prejudicial to the Defendant that this Application is brought after six years and just a day before the hearing of this substantive suit. That from the foregoing, it is evident that the Plaintiff's Application is a delay tactic aimed at further delaying the hearing of this suit, contrary to the provisions of Section 1A and 1B of the Civil Procedure Act, Cap. 21 Laws of Kenya, which mandates the just expeditious disposal of suits.
4. That in any case, nothing in law precludes the Plaintiff from filing a report from the EACC in a further list of documents or calling an expert witness before this Honorable Court to support the Plaintiff's case. That although this Honourable Court has the power to exercise its discretion, such discretion should be exercised in a just manner, taking into account the prevailing circumstances of the instant case, which is to prevent the further delay of this suit.
5. I have carefully considered the application, affidavits and submissions therein. Order 1 Rule 10 (2) of the Civil Procedure Rules provides for a party to be enjoined in a suit as a necessary party as follows;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
6. This order requires the Court to evaluate the importance of such a party to the suit and their relevance to the just determination of the suit. The provisions were echoed by the Court of Appeal of Tanzania



in *Tang Gas Distributors Ltd vs. Said & Others* (2014) EA 448 as quoted by the Court of Appeal in *IMK vs MWM & another* (2015) eKLR stated that;

“can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage”.

7. The suit has not been heard and no final orders issued so the application is properly before this Court. In the case of *Joseph Njau Kingori vs Robert Maina Chege & 3 others* (2002) eKLR listed four aspects to look at before joining a party to a suit and these are;
 - i. Is a necessary party?
 - ii. A proper party;
 - iii. There is a relief flowing from him to the plaintiff;
 - iv. The ultimate order or decree cannot be enforced without his participation in the proceedings.
8. In the case of *Julius Meme vs Republic & another* (2004) eKLR the court held that;
 - i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
 - ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
 - iii. Joinder to preempt a likely course of proliferated litigation
9. The Applicant contends that the Applicant/Intended 2nd Plaintiff is in the process of concluding the investigation into the alleged fraudulent and corrupt alienation of the suit property. That the investigations by the Intended 2nd Plaintiff will assist this Court completely and effectually adjudicate upon and settle all questions involved in the Plaintiff/Applicant's suit. This Court cannot determine the merits of the Plaintiff's suit at this juncture as it will require parties to adduce evidence. The allegations of fraud as enumerated in the Plaintiff's suit paints a picture of illegality against the 1st defendant. It is trite that allegations of fraud must be proved see *Emfil Limited vs Registrar of Titles Mombasa & 2 others* (2014) eKLR where the Court held that;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.
10. I agree that joining the Applicant as a party to this suit and allowing the Applicant/2nd plaintiff to file all the evidential exhibits obtained during the investigations will enable the court effectually, completely and conclusively adjudicate over the matter. I find that the application is merited and I grant the following orders;
 1. The Ethics and Anti-Corruption Commission be joined as 2nd Plaintiff in this suit and the plaintiff's be granted leave to file a joint Plaintiff and necessary pretrial documents within the next 14 days from the date of this ruling.



2. The Defendants are granted 14 days thereafter to file amended defences and further documents if need be.
3. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

